Supreme Court, U.S.
FILED

No.

DEC 30 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

Petitioners

v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.

DR. H.M. REEVES, SELMA MEDICAL CENTER ET AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

I. Whether Hon. Circuit Judge in Dallas County Alabama can circumvent the law on timely filing of affirmative defenses by himself two years after the case was transferred from Circuit Court of Jefferson County, suddenly grant a summary judgment claiming "nothing that shows that a personal representative has ever been appointed on behalf of the decedent"... when one of the petitioners was a 3-months old baby left by the decedent and is represented in this case by his father, Johnny Waters, also Petitioner, and the baby, Joseph Waters, rights to due process in the courts, and liberty rights under the 5th and 14th Amendments to the U.S. Constitution were violated by this untimely ruling without a hearing of a Circuit Judge in Dallas County, Ala., and also whether the judge ignored Alabama law cases concerning all parties to a pleading, Code of Alabama, §43-2-250 and Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898).

II. Whether Jeanne Carol Waters constitutional right to live and due process under the 5th and

QUESTIONS PRESENTED (CONTINUED)

14th Amendments to the U.S. Constitution were violated when a resident doctor, who had performed the same operation two times on patient/petitioner, and had her life support systems removed when he had no authorization from UAB Hospital or a court order after the patient/petitioner had been given drug Pavulon to induc unconsciousness?

III. Whether the civil rights [42 U.S.C. § 1983] were violated because of the constitutional rights of Jeanne Carol Waters were violated [5th and 14th Amendments to the U.S. Consitution and question of whether under 2-year or the 6-year statute of limitations because of trespass on the person as seen in the Alabama case [Beard v. Stevens, 372 F. 2d 685, (1987)] because Jeanne Carol Waters was assaulted and trespassed on her person by the can consider the merits of the case and rule as to the length of time this type of civil rights violation led to the premature and wrongful death of Jeanne Carol Waters, i.e.

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QUESTIONS PRESENTED (CONTINUED)

unauthorized pulling of her life support systems by resident doctors [doctors in training when she had been induced to be unconscious by a drug, Pavulon, causing her die [she lived approximately 2 hours after pulling life support system indicating she was not brain dead] after she had been induced to be unconscious by a drug, Pavulon, causing her to die?

IV.. Whether a hospital can bury their mistakes and wrong doings by their agents, resident doctors [doctors in training] with legal technicalities that infringe upon the U.S. Constitutional rights of Jeanne Carol Waters by violating her civil rights when she had a right to live under the 5th and 14th Amendments to U.S. Constitution.

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QUESTIONS PRESENTED (CONTINUED)

PARTIES TO THE PROCEEDING

The Plaintiffs/Appellants/Petitioners are: Johnny H. Waters, Joseph H. Waters, and Jeanne Carol Waters.

The Defendants/Appellees/Repondents are: The University of Alabama Birmingham Medical Center, University of Alabama Hospitals, DR. H.M. REEVES AND SELMA MEDICAL CENTER

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHNNY H. WATERS, ET AL.

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v.

THE UNIVERSITY OF ALABAMA BIRMINGHAM MEDICAL CENTER, UNIVERSITY OF ALABAMA HOSPITALS, ET AL.

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OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below into this Writ of Certiorari.

JURISDICTION

Reversal and review is sought from the final decision from the Supreme Court of Alabama, the highest court in Alabama who originally denied the appeal. Jurisdiction i invoked under 28 U.S.C. § 1254 as Writ.

Constitutional Provisions involved

Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of

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... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

The original case was timely filed on Jan. 2, 1991, when the Complaint was filed with Exhibits (Vol. I, p. 1-25).

On March 11, 1991, the Plaintiffs attorney filed three volumes of medical records from the University of Alabama Hospitals, and other medical records (Vol. I, p. 52 through Vol. IV, p. 701, including autopsy reports.)

Threshold issue is on the DeStafney exception on person injury applies [DeStafney v. University of Alabama, 413 So. 2d 1281 (Ala. 1981)],

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and the instant case should be reversed and remanded to Jefferson County where the personal injury took place before the wrongful death of Jeanne Carol Waters which is the subject of this appeal. Jeanne Carol Waters died in Jefferson County Alabama [See Certificate of death, dated April 2, 1989, in Jefferson County, Alabama, Vol. III, p. 570].

Waters rights under the 5th and 14th Amendments of the right to live under the U.S. Constitution since her life was taken when the life support systems were pulled by the same resident doctor who had to performed the same operation two times at the UAB Hospital in Birmingham, Alabama.

The Petitioner points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

Jeanne Carol Waters was transferred from a Selma Hospital by air transport and Dr. Hipp performed an operation on her head and Dr. Hipp failed to use proper surgical technique and he failed to use peri-operative antibodies and she developed Staphyloccocus aureus and Dr. Hipp had to perform the same operation the second time. The point is that Dr. Hipp, a resident doctor [doctor in training] failed to contact his superior, a staff doctor at the hospital, and pulled the life support systems of Jeanne Carol Waters when she was not yet brain dead, and Dr. Hipp pulled the life support systems from Jeanne Carol Waters without authorization from the hospital, family or court order, which was the proximate cause of the premature and wrongful death of Jeanne Carol Waters. She had given normal birth to Joseph H. Waters, three months before she died.

Jeanne Carol Waters who had been induced to be unconscious with the drug Pavulon was unable to give permission to have her life support systems removed. In fact, Jeanne Carol Waters

was clearly assaulted and her person trespassed upon when the resident doctor without authorization from the hopsital, family or court order pulled the life support systems off Jeanne Carol Waters who had been induced to be unconscious and lived approximately 2 hours before she died showing she was not brain dead.

The Petitioner incorporates all statements in the "Statement of the Facts" into this section of the Brief.

STATEMENT OF THE FACTS

The Petitioner, Jeanne Carol Waters, had a right to live under the 5th and 14th Amendments to the U.S. Constitution, and when the resident doctors, Dr. Hipp and Dr. Austin-Vives pull the life support systems at UAB Hospital in Birmingham, without any authorization from the hospital or court order, the civil rights of Jeanne Carol Waters was violated under the 42 U.S.C. § 1983, especially since Jeanne Carol Waters had been induced to be unconsicious with the drug Pavulon.

The state law concerning sovereign immunity pursuant to Ala. Const. Art. I, § XIV (1901), was challeged when the State of Alabama was sued in the federal court, U.S. District Court, Middle District of Alabama, and appealed to the U.S. Court of Appeals, Eleventh Circuit.

The state of Alabama has conflicting law as to whether the two-year statute of limitations or six-year statute of limitations applies in the instant case because clearly Jeanne Carol Waters was trespassed on her person because she had been induced to be unconscious by the drug, Pavulon, before the life support systems were illegally pulled, i.e. Jeanne Carol Waters was assaulted when the life support systems were pulled by a resident doctor [doctor in training who had performed the same operation two times] and an employee of the University of Alabama Hospitals, Birmingham... and the resident doctor was reponsible for the personal injury and wrongful death of Jeanne Carol Waters due to the resident doctor

negligence and breach of acceptable standards of practice by pulling life support systems without any valid medical or legal reason and therefore the medical services were below standards in the community due to the UAB Hospital agents, servants and/or employees, including the negligence in the hiring by Dr. L. Clark Taylor, Jr.

It appears that the taking of the life by the hospital's agent, resident doctor, Dr. Hipp, who was in training, that caused Jeanne Carol Waters constitutional right to life under the 5th and 14th Amendment to the U.S. Constitution has been ignored by both state and federal courts below by the state court alleging a defense of sovereign immunity which was challenged in the federal court, and by the federal court alleging technicalities

The point is this case is now a case where state and federal legal technicalities are causing and infringing upon the constitutional right of Jeanne Carol Waters' right

to life under the 5th and 14th Amendments to the U.S. Constitution, and therefore, under federal law such as Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 249 U.S. 389, 63 L. Ed. 662, the federal constitutional rights should prevail.

The Dr. Reeves malpracticed Mrs. Waters while she was in Selma, Alabama by not taking precautions to prevent infection. Doctors at the Selma Medical Center failed to have lab tests on "green vomit" and other irregularities which was the reason Mrs. Waters was transferred to the UAB Hospital in Jefferson County, Alabama.

The lawyers for Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses which was a violation of Alabama procedural law [See Argument], and the Honorable Circuit Judge of Dallas County, Alabama after two years since transferred part

of case to Selma, Alabama, the judge suddenly circumvented the laws of Alabama procedural law and the judge himself wrote the order as seen in Appendix A to this Brief, and the Petitioners state this is a violation of the due process under the 5th and 14th Amendments to the U.S. Constitution.

The Writ of Certiorari should be granted and a merits brief allowed to be written, and then the instant case should be reversed and remanded with instructions on constitutional law to the trial court to be tried by a jury on all triable issues in the instant case.

REASONS FOR WRIT OF CERTIORARI

Questions I,II,III, and IV are discussed this section together since the bottom line is that the Petitioners have not had due process in any court which is a violation of the 5th and 14th Amendments to the U.S. Constitution.

The Honorable Judge in Dallas County Circuit Court [See Appendix A] untimely circumvented the law in Alabama concerning timely filing of affirmative defenses when the judge waited two-years after the instant case, part of which was transferred back to Selma, Alabama, to incorrectly rule according to a case Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is not applicable in the instant case since the lawyers for both Dr. Reeves and Selma Medical Center failed to timely file answers and/or affirmative defenses. See Blase v. Blase, Ala. Civ. App. 419 So. 2d 599 at 600, (1982) which held that a general rule, affirmative defense is waived if it is not timely pleaded.

See Alabama Supreme court case which held that affirmative defenses were to be deemed waived if not affirmatively pleaded, International Longshoremen's Association v. Davis, 470 So. 2d 1413 (Ala. 1985); International Longshoremen's Association v. Davis, 476 U.S. 280, 90 L. Ed 2d 389, 106 S Ct 1904 (1986). As a matter of law both Motions for Summary Judgment should have been stricken from record of the two lawyers representing the Selma section of this lawsuit because of failure to timely file affirmative defenses as to personal representative, instead of the Honorable Judge of the Circuit Court of Dallas County, in Selma, Alabama circumventing Alabama law on affirmative defenses and untimely ruling himself after two years as seen in order in Appendix A when the said Downtown case supra is not applicable as seen in Code of Alabama §43-2-2 as interpreted in the comments that administrator ad litem will not be appointed under this section

where all parties interested in the final settlement of the estate are before the court. [Emphasis added], which are the facts in this instant case. See Ex parte Baker, 118 Ala. 185, 23 So. 996 (1898) discussing the origin of the section. See also Gayle V. Johnson, 72 Ala. 254 (1882), Faulk v. Money, 236 Ala. 69, 181 So. 256 (1938). See Code of Alabama, §43-8-41(3) showing the parties of interest are the spouse and the infant represented by the next of kin the father, which is distinguished from the Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala. 1979), which is concerned with a son suing in behalf of a parent. The infant son, Joseph Hugh Waters was only 3½ months old at the time of death of his mother which should toll wrongful death action.

The Supreme Court of Alabama has recently passed some time of procedural rules concerning ruling Affirmed with no opinion which further violates the due process rights in the instant case when a two-year sudden untimely filing of a judge instead of ruling on summary judgments

before him decides to circumvent the law on affirmative defenses as stated above and which were before him in "Motion to Strike... Motion for summary judgment... which pointed out that the lawyers had not timely filed answers and/o affirmative defenses.

This Writ of Certiorari should be granted and the Merits brief allowed to be written not only on the Selma part of this case but also the Birmingham part of this case. The bottom line is that no due process under the 5th and 14th amendments to the U.S. Constitution have been shown in any court in this instant case.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903 (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13.

Writ, showing violation of due process under 5th and 14th Amendments and civil rights.

The Appellant points out the inconsistency of the law, especially on trespass of the person which is applicable in the instant case.

See Beard v. Stevens, 372 F. 2d 685 (1987), which states, "Alabama six-year statute applicable to trepass applied to action against sheriff and deputies for alleged civil rights violations..."

This law in Beard case is in direct conflict with Owens v. Okure, 488 U.S. 235 (1988); Jones v. Preuit & Mauldin, 876 F. 2d 1480 (11th Cir. 1989); and Code of Alabama, § 6-2-38(1) (Supp. 1992), state law infringes upon the constitutional rights of Jeanne Carol Waters, right to live and due process under the 5th and 14th Amendments to the U.S. Constitution which triggers in the 42 U.S.C. § 1983 civil rights claim.

Monell v. New York City Dept. of Soc. Serv. 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018,

which states,

"Civil Rights § 12.5 -- Liability for violations -- state law immunities - 11a, 11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of the federally protected rights."

See Owens and Lessard v. Okure, 57 LW 4065 at 4069 which states,

"We explained that the Civil Rights Acts provided: "[a] unique remedy making it appropriate to accord the statute a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws.' Monroe v. Pape, 365, U.S. 167, 173, (1961), and is in all events, supplementary to any remedy any State might have..."

Also see Bantam Books, Inc. v. Sullivan, R.I., 1963, 83 S Ct 631, 372 U.S. 58, 9 L. Ed 2d 584, which states,

"The Supreme Court's appellate jurisdiction was properly invoked, where the state court judgment sought to be reviewed upheld a state statute against contention that on its face and as applied, the statute violated the federal Constitution."

See Standard Oil Co. v. Graves, Wash. 1919, 49 S Ct 320, 269 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judge by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void.] (Emphasis added.)

In the instant case, the same person, Dr. Hipp [Resident doctor] who had to operate on Jeanne Carol Waters two times for the same type of operation, induced unconsciousness by drug, Pavulon, and then he pulled the life support systems of Jeanne Carol Waters [not talking about allegedly pulled life support systems but actually pulled life systems and he signed his name in medical record of UAB] which was called wrongful death in this case but was actually MURDER I to cover his mistakes of having to operate two (2) times on Jeanne Carol Waters.

Jeanne Carol Waters was not brain dead but induced to be unconscious by drug, Pavulon, and she breathed from 9:20 A.M. to 11:00 A.M. on her own showing she was not brain dead after the unauthorized removal of her life support systems.

The UAB hospital tried to cover the death incident by producing heart record, EKG's, instead of EEG's and certainly Jeanne Carol Waters had a right to live under the 5th and 14th Amendments to the U.S. Constitution, and has not received due process in the judicial system with the Owens v. Okure, supra case.

The Owens v. Okure case supra, in Alabama is inconsistent with the trespass on the person 6-year statute in Beard case, quoted above, and especially since the Owens v. Okure case stands for the fact federal law can override certain state law. The Honorable Supreme Court of the United States should reinterpret this Owens v. Okure, as to the exception of trespass on the person, wrongful death, and/or MURDER I, when life support systems are pulled by resident doctor who was not authorized by the hospital, court order, or consent of the family.

There is a question whether wrongful death and/or trespass on the person (assault), and/or MURDER I, can toll the time of any statute of limitations when the patient, Jeanne carol Waters, was unconscious by drug induced Pavulon, and she could not give her consent.

Clearly, the Honorable trial judge made reversible error when the violation of Jeanne Carol Waters due process rights to live under the 5th and 14th Amendments to the U.S. Constitution, and he due process rights to be in the courts under the personal injury [trespass on the person], exception to the sovereign immunity of a state.

DeStafney Exception on Personal Injury

See DeStafney v. University of Alabama, 413 So. 2d 391, at 395 which states,

"Clearly, under the guidelines of Gill and Milton, a claim for personal injury based upon the alleged negligent conduct of a State employee, even when committed in the line and scope of employment, is not within the ambit of § 14's protection.

These constitutional violations trigger the 42 U.S.C. § 1983, and in the instant case, the 6-year statute of limitations is applicable because of trespass on person - See Beard v. Stevens, 372 F. 2d 685 (1987).

"Alabama six-year statute applicable to trespass applied to action against sheriff and deputies for alleged civil rights violations..."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process. There was no notice or hearing to pull the life support system of Jeanne Carol Waters [violation of her due process rights under the 5th and 14th amendments to U.S. Constitution, right to live], when the resident doctor had to perform the same operation two times on Jeanne Carol Waters and he decided to pull the life support systems without authorization from the hospital or any court, and she died a wrongful death. Secondly, the due

process rights under the 5th and 14th Amendments to the U.S. Constitutional right to live comes under the failure of the state court to recognize own law as to the exception to state immunity as to person injury when is met in the DeStafney case supra above exception. The third due process rights of Jeanne Carol Waters is violated when the 6-year statute of limitations as to trespass on the person was not observed as stated in the Beard case supra.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

University of Alabama Hospital agents, resident doctors, violating the 5th and 14th amendments to the U.S. Constitution and triggered 42 U.S.C. § 1983 as to 3¼ months old of Jeanne carol Waters that was wrongfully deprived of his mother and there is no immunity for the University of Alabama Hospitals as

shown in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 56 L. Ed 2d 611, 98 S. Ct 2018, which states,

"Civil Rights § 12.5 -- liability for violations -- state law immunities - 11a,11b. State-law immunities do not override a cause of action under 42 U.S.C. § 1983, which imposes civil liability on any person who deprives another of his federally protected rights."

CONCLUSION

The Writ of Certiorari should be granted for the above reasons, and the Petitioner should be allowed to write the Merits brief so that the instant case can be reversed and remanded to the trial court for all triable issues before a jury.

Respectively submitted,

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APPENDIX A

In the Circuit Court of Dallas County, Alabama

Johnny H. Waters, et al.

Plaintiffs,

vs. Case mp/ CV 91-125

Dr. H.M. Reeves, et al.

Defendants

ORDER

This cause is before the Court on the motion of the Defendants for summary judgment. The Court, having reviewed the file, finds nothing that shows that a personal representative has ever been appointed on behalf of the decedent to prosecute this wrongful death action. Accordingly, on the authority of Downtown Nursing Home v. Poole, 375 So. 2d 465 (Ala.1979) the motion for summary Judgment is granted and this cause is dismissed.

DONE and ORDERED this 19th day of March, 1993. [Entered March 23, 1993].

s/ Circuit Judge Meigs.

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

DR. H.M. REEVES, et al.

Defendants.

AFFIRMED. No opinion.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

August 27, 1993.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

JOHNNY H. WATERS, et al.

Plaintiffs,

vs. #1921163

Dr. H.M. Reeves, et al.

Defendants.

Application for rehearing overruled.

NO OPINION. October 1, 1993.

JUSTICES HOUSTON, HORNSBY, MADDOX, SHORES, AND KENNEDY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above Writ was sent to Mr. H.M. Treschsel, Office of Counsel, University of Alabama System, UAB Station, MJH, 112, Birmingham, Alabama 35294-2010, Mr. William Dudley Motlow, Jr., Porterfield, Harper & Mills, #2 Office Park Drive, Ste 1, P.O. Box 530790, Birmingham, Alabama 35253-0790, and Mr. Thomas H. Keene, Rushton, Stakely, Johnston & Garrett, P.O. Box 270, Montgomery, Alabama 36195 this 30 day of December, 1993.

Julia Asam